

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

WEISKOPF
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29741

FILE: B-214405, et al. **DATE:** November 7, 1984

MATTER OF: Environmental Aseptic Services
Administration

DIGEST:

Protester alleging a liquidated damages provision imposes a penalty must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. A solicitation provision shown to authorize deductions for an entire lot of custodial services, based on the contractor's unsatisfactory performance of only a portion of the tasks, imposes a penalty if it authorizes deductions without regard to what proportion of the services renders the entire lot unsuitable for the government's purpose.

Environmental Aseptic Services Administration (EASA) protests that five invitations for bids (IFBs), issued by the General Services Administration (GSA) for custodial services, contain provisions imposing allegedly unfair monetary deductions for defective performance.^{1/}

We deny the protests.

Each of the solicitations contains a table, captioned "Criteria for Deductions," that lists broad categories of services covered by the specifications, and states an

^{1/}The solicitation numbers and our respective docket numbers are listed below:

<u>GSA Solicitation No.</u>	<u>GAO Docket No.</u>
GS-07B-21621	B-214405
GS-07B-21636	B-214573
QPR-9PPB-84-01278	B-214575
GS-07B-21624	B-214606
GS-04B-84622	B-214790

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amount to be deducted for each category of services when the contractor unsatisfactorily performs a specified unit, or lot, of those services. For example, one specification lists a \$1.23 deduction for the unsatisfactory cleaning of a toilet fixture, and a \$3.60 deduction for the unsatisfactory cleaning of 1000 square feet of workroom space. In addition, the solicitations contain the following clause:

"Application of Criteria for Deductions

"A. Toilet Cleaning. In instances where toilet rooms are not satisfactorily cleaned or policed and serviced as determined by the contracting officer's designated representative, deductions shall be made for the entire room at the rate indicated in the Criteria for Deductions . . . multiplied by the number of fixtures in the toilet room (fixtures are water closets, urinals, and washbasins).

"B. Room Cleaning. In instances where room cleaning has not been satisfactorily performed, or where any portion or portions of work have been omitted or inadequately performed, a deduction for the entire room area shall be made at the rate indicated in the Criteria for Deductions. . . . (NOTE: In large open areas, the building support columns or other obvious dividers should be considered in determining the composition of an individual office when deductions are being made.)"

The protester's contention that the solicitations impose penalties relates to the fact that the provisions apparently authorize deductions for an entire room based on the contractor's unsatisfactory performance of a portion of the room. (The protester does not challenge the actual rates of deductions listed.)

The challenged provisions, along with the Criteria for Deductions, establish a system of liquidated damages--that is, fixed amounts the government can recover from the contractor upon proof of violation of the contract, and without proof of the damages actually sustained. Environmental Aseptic Services Administration and Larson Building Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194. The Federal Acquisition Regulation (FAR), like the Federal

Procurement Regulations (FPR) that it superseded, requires that a rate of liquidated damages be reasonable in light of the solicitation's requirements since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR, § 12.202(b), 48 Fed. Reg. 42,102, 46,160 (1983) (to be codified at 48 C.F.R. § 12.202(b) and basically restating FPR, 41 C.F.R. § 1-1.315-2(c) (1983)).

We will review a protest that a solicitation's liquidated damages provisions impose a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Services Administration and Larson Building Care Inc., supra. The spectre of incurring substantial penalties might discourage potential bidders from competing, or cause others not to offer as low a price as they might otherwise be willing to offer. In this respect, the protester did not submit a bid under any of the solicitations (although it is not clear that the alleged penalties, by themselves, prevented the protester from doing so).

Before we will rule that a liquidated damages provision imposes a penalty, however, the protester must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. See International Business Investments, Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668. The contracting agency is most familiar with the circumstances of its procurements, and our standard of review has been fashioned to take this into account; the protester, therefore, bears the burden of showing that the liquidated damages rate is arbitrary or otherwise unreasonable. Eldorado College, B-213109, Feb. 27, 1984, 84-1 CPD ¶ 238.

Here, the protester complains about two features of the liquidated damages provisions, which the protester contends establish that the deduction rates are unreasonable. Those are first, that there is no variation between the amounts deductible for a marginal failure and a complete failure within a particular lot--in either case, a deduction may be taken for the entire room--and second, as a consequence, the deduction procedure deprives the contractor of credit for partial or substantial performance.

We do not believe that liquidated damages are invalid, per se, simply because the rates of deductions fail to vary in proportion to the extent of inadequate performance. Rather, we believe that a liquidated damages scheme properly may result in a deduction for an entire lot of services based on the contractor's failure to satisfactorily perform only a portion of the component tasks, if the nature of the deficiencies render the lot unsuitable for the government's purposes. See Environmental Aseptic Services Administration and Larson Building Care Inc., supra; see also Orlando Williams d/b/a Orlando Williams Janitorial Service, Armed Services Board of Contract Appeals (ASBCA) Nos. 26,099, 26872, Nov. 28, 1983, reprinted in 84-1 B.C.A. ¶ 16,983 (CCH 1984).

The solicitation provision authorizing a deduction for an entire toilet room where the rooms "are not satisfactorily cleaned or policed and serviced" is not inconsistent with this standard. The provision leaves a determination of what proportion of the tasks renders the entire room unsatisfactory to the inspector's discretion, which presumably will be exercised in good faith and in compliance with procurement laws and regulations. If GSA administers the provision by taking deductions without regard to whether the deficiencies are of such a proportion as to render the toilet room unsuitable for the government's purpose, that would involve a matter of contract administration, see United Food Services, Inc., B-215538, Oct. 23, 1984, 84-2 CPD _____, which the contractor could challenge pursuant to the contract's disputes clause, but not before this Office.

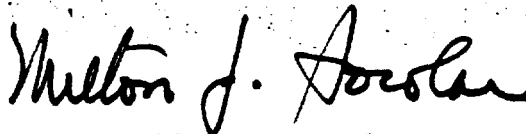
The room cleaning provision goes further than the toilet cleaning one, however, stating that in instances "where room cleaning has not been satisfactorily performed, or where any portion or portions of work have been omitted or inadequately performed, a deduction for the entire room shall be made. . . ." This could be interpreted as authorizing a deduction for a large room containing, for example, 20 work stations because of the contractor's failure to clean one station adequately. Absent circumstances where the unsatisfactory cleaning of one station would render the entire room unsuitable for the government's purpose, the provision would impose damages without regard to the proportion of satisfactory performance and deny the contractor credit for substantial performance. We believe that such an application of the provision would result in a penalty. In this respect, the

ASBCA has held that such an "all or none" inspection procedure, employed to inspect rooms serviced under a custodial contract, imposes an unfair and unreasonable penalty. See Orlando Williams d/b/a Orlando Williams Janitorial Service, supra; Clarkies, Inc., ASBCA No. 22,784, Aug. 13, 1981, reprinted in 81-2 B.C.A. ¶ 15,313 (CCH 1981). While the threat of a penalty might serve as a spur to satisfactory performance, it is well-settled that such a penalty is improper and unenforceable. Priebe & Sons v. United States, 332 U.S. 407 (1947).

GSA insists that the intent of the room-cleaning provision is to permit deductions for entire rooms (or areas) where inspection of the rooms reveals performance defects that render the entire rooms defective. We do not think that this intention is manifestly or reasonably apparent from the language of the solicitation and by separate letter, we are recommending to the Administrator of General Services that future solicitations be amended to reflect the agency's intention clearly in order to prevent the adverse effect a penalty provision can have on competition.

We do not believe, however, that the defect in the room-cleaning provision is of sufficient magnitude to require correction of the current solicitations, under each of which bids already have opened or a contract awarded. Under such circumstances in the past, we have advised the contracting agency that it should avoid taking unreasonable deductions in administering the contract; the presence of penalty provisions by themselves, however, did not pose an obstacle to a valid award. See Environmental Aseptic Services Administration and Larson Building Care Inc., supra; Linda Vista Industries, Inc., B-214447, et al., Oct. 2, 1984, 84-2 CPD ¶ ____. We believe the same result should obtain here, especially since the record shows that GSA obtained adequate competition under each solicitation. See Linda Vista Industries, Inc., supra.

We therefore deny the protest, but are recommending revision of future solicitations.

for 
Comptroller General
of the United States